

California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes

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I. DIVORCE AND MEDIATION

In the United States divorce has become commonplace. Approximately thirty-eight percent of all marriages are now ending in divorce. Since 1950 the divorce rate has doubled from 3.3 per thousand to 5.6 per thousand in population.¹ Because of this rapid increase, family courts handling divorces and associated disputes have had to find new ways to process the divorce tidal wave. California has met this challenge by becoming the first state to enact a statute that required mediation of child custody and visitation disputes. Although flawed, this mediation process has several advantages over the traditional adversarial fact-finding process in resolving divorce disputes.

Before divorce law reform began, the traditional domestic relations court processed divorce and child custody cases in much the same way as any other civil case, by using a judge or jury trial once settlement could not be reached.² The state courts reserved the right to say whether a divorce would be granted, how the assets would be divided, whether alimony would be allowed, and who would obtain custody of any children from the marriage. The state courts justified their supervision of the marriage relationship by the states' *parens patriae* responsibility to its citizens.³ In every case, the spouse requesting the divorce had to assert proper grounds, generally statutory, for the termination of the marriage.⁴ This requirement blended well with the standard, adversarial civil trial because one spouse was found to have wronged the other.

In the 1970s the no-fault divorce statutes emerged.⁵ These statutes allowed a divorce without a party having to assert that

1. McIsaac, *Court-Connected Mediation*, 21 CONCILIATION CTS. REV. 49 (1983).

2. See generally, Note, *Non-Judicial Resolution of Custody and Visitation Disputes*, 12 U.C.D. L. REV. 582 (1979) (discussing changes in the adversarial method of resolving divorce disputes).

3. Spencer & Zammitt, *Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 911, 911 (1976).

4. Jenkins, *Divorce California Style*, 9 STUDENT LAW. 30 (1981).

5. King, *Handling Custody and Visitation Disputes Under the New Mandatory Mediation Law*, 2 CAL. LAW. 40 (1982).

one spouse was guilty of a wrongful act.⁶ Along with the no-fault concept, new methods of resolving marital disputes developed.⁷ Domestic relations courts began to offer counseling services, arbitration, and mediation. In arbitration, an impartial third party hears the evidence and delivers a final and binding determination of the parties' dispute.⁸ "Mediation is a cooperative dispute resolution process in which a neutral third party tries to keep the contesting parties talking while steering them towards a mutual settlement of their differences."⁹

Both arbitration and mediation are more informal than the traditional adversary model of resolving disputes. Mediation is the more informal of the two because the parties reach their own agreement, rather than having a third party make a decision for them. Because the arbitrator in an arbitration proceeding makes the final decision, arbitration retains a somewhat more adverse aura. This may be because mediation has developed from African roots, socialist "comrades' courts," and psychotherapy, rather than from the more adversarial Anglo-American jurisprudence.¹⁰ Mediation stresses honest, open communication, attention to the underlying causes of disputes, reinforcement of positive bonds, and avoidance of blame.¹¹ Its purpose is to "reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attention and dispositions toward one another."¹²

In a mediation session, the neutral, third party mediator must first obtain the parties' trust and confidence. The mediator then elicits information from the parties about the causes of the dispute, the issues, the emotions involved, and the power variables that affect the parties.¹³ The mediator must next persuade the parties that strict adherence to their original positions is unreasonable. Finally, the mediator suggests options, attempts to make obstinate

6. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 953 (1979).

7. Note, *supra* note 2, at 587-97.

8. K. SEIDE, A DICTIONARY OF ARBITRATION AND ITS TERMS 27 (1970).

9. Pearson, *Child Custody: Why Not Let the Parents Decide?*, 20 JUDGES' J. 4 (1981).

10. Felstiner & Williams, Community Mediation in Dorchester, Massachusetts, Los Angeles: Program for Dispute System Research, Social Science Research Institute, University of Southern California (unpublished manuscript), *cited in* Pearson, *supra* note 9.

11. Pearson, *supra* note 9.

12. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1979).

13. Pearson, *supra* note 9.

parties change their positions, and controls improper behavior during the discussion.¹⁴ If the parties reach an agreement, it is usually written out and becomes a contract, and may have all the rights and enforceability of a contract.¹⁵

Mediation fosters values that are extremely important in the resolution of family disputes: privacy and self-determination. In divorce situations mediation can "provide a nonadversary setting in which families are encouraged to take responsibility for custody and visitation decisions and for the effective implementation of these decisions."¹⁶ For these reasons, and because of the increase in divorce cases, many domestic relations courts view mediation as a viable alternative to the use of the traditional adversary model of resolving divorce disputes.

Mediation is now being offered in connection with many family courts.¹⁷ Court connected mediation is not used as marriage counseling, and mediators do not attempt to effect a reconciliation. Rather, when reconciliation is considered hopeless, the mediator helps shape a divorce agreement that the parties can use in their new, separate lives.¹⁸ Private sector mediation, which includes mediation services not connected with the court, has also been offered to the general public for many years for the resolution of family disputes. Attorneys or psychologists usually offer these mediation services for a fee.¹⁹

If mediation is offered in connection with a family court, it is generally on a voluntary or a referral basis.²⁰ A few states, however, have made mediation mandatory for divorce disputes.²¹ The first state to make mediation mandatory for child custody and

14. *Id.*

15. See generally Freedman, *LEGAL ISSUES IN MEDIATION: ARE MEDIATION AGREEMENTS ENFORCEABLE* 12-14 (1984) (Unpublished manuscript available from The American Bar Association, Special Committee on Dispute Resolution, Washington, D.C.).

16. Note, *supra* note 2, at 593.

17. Note, *supra* note 2, at 595.

18. Jenkins, *supra* note 4, at 5.

19. *Id.* at 44.

20. States offering divorce dispute mediation through statute include Alaska, Iowa, Michigan, and Oregon. See ALASKA STAT. § 25.24.060 (1984); IOWA CODE ANN. § 598.41 (West Supp. 1985); MICH. COMP. LAWS ANN. § 552.513 (West Supp. 1985); OR. REV. STAT. §§ 107.755-107.795 (1984). Many other states offer divorce mediation, however, they have not adopted a statute. Wisconsin, for example, allows judges to prescribe mediation through the general adjudicatory power given them in Wis. STAT. ANN. § 767.01 (West 1981).

21. See CAL. CIV. CODE §§ 4351.5, 4607 (West 1983 & Supp. 1985). Delaware also requires mediation for the disposition of child custody and visitation disputes as well as child and spousal support, property division, alimony, attorney's fees and court costs. See DEL. FAM. CT. R. 470, 151, 465, reprinted in AMERICAN BAR ASSOCIATION, SPECIAL COMMITTEE ON DISPUTE RESOLUTION, MONOGRAPH SERIES—No. 2, LEGISLATION ON DISPUTE RESOLUTION 18 (1984).

visitation disputes was California in January 1981.²² Family law commentators expect more states to follow California's lead in enacting mandatory mediation statutes, just as almost every state has enacted a no-fault divorce statute patterned after California's divorce statute enacted in 1970.²³ An understanding and analysis of California's mandatory statutes is important to the development of fair and effective divorce proceedings to handle the rapidly increasing number of divorce cases in the future.

The remainder of this Note will focus on California's mandatory mediation statutes and whether or not they have been successful in accomplishing the state's goals. Specific problems with California's mediation statutes and the mediation of family disputes in general, such as confidentiality and children's rights, will be discussed.

II. THE CALIFORNIA APPROACH

A. *The Statutes*

California Civil Code section 4607 became operative on January 1, 1981 (with slight amendment in 1983). Section 4607(a) states:

In any proceeding where there is an issue of custody of or visitation with a minor child, and where it appears on the face of the petition or other application for an order or modification of an order for the custody or visitation of a child or children that either or both issues are contested, as provided in Section 4600, 4600.1 or 4601 [general child custody statutes], the matter shall be set for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing. The purpose of such mediation shall be to reduce acrimony which may exist between the parties and to develop an agreement assuring the child or children's close and continuing contact with both parents. The mediator shall use his or her best efforts to effect a settlement of the custody or visitation dispute.²⁴

Subsection (b) of the statute requires that every county superior court make a mediator available. The mediator can be a member of the professional staff of a family conciliation court, the probation department, or mental health services agency; or may be any other person or agency designated by the court. Thus, the mediator(s) may be court staff members or private professionals. Therefore, while subsection (b) does not require that the county

22. CAL. CIV. CODE § 4607 (West 1983 & Supp. 1985).

23. CAL. CIV. CODE § 4506(1) (West 1983 & Supp. 1985).

24. CAL. CIV. CODE § 4607 (West 1983 & Supp. 1985).

court institute a family conciliation court if it does not already have one, the county court must provide free mediation to parties.²⁵

Subsection (b) also requires that the mediator meet certain minimum qualifications listed in California Code of Civil Procedure section 1745 for a counselor of conciliation. These qualifications include a master's degree in psychology, social work, or marriage, family, or child counseling; as well as knowledge of child development and the California family court system.²⁶ Because of these requirements, most California court-appointed mediators will have a psychology or sociology background rather than a legal background. Lawyers are foreclosed from being California court mediators unless they also attain a master's degree in one of the required areas.

Subsections (c) through (e) of California Civil Code section 4607 discuss the confidentiality of the mediation sessions and specify certain rights of the parties. Subsection (c) states: "Mediation proceedings shall be held in private and shall be confidential, and all communications, verbal or written, from the parties to the mediator made in a proceeding pursuant to this section shall be deemed to be official information within the meaning of section 1040 of the Evidence Code."²⁷ Section 1040 of the California Evidence Code provides that a public entity has a privilege to refuse to disclose official information, such as the information elicited from the parties during the mediation sessions, and to prevent another from disclosing such information.²⁸

The confidential and self-determination aspects of the mediation are strongly affected, however, by subsection (e) which require that any agreement reached during mediation be reported by the mediator to the parties' lawyers and to the court on the day of the mediation or any time thereafter designated by the court.²⁹ Subsection (e) also permits the mediator to make a custody or visitation recommendation to the court if the parties cannot reach an agreement, provided this is consistent with local law.³⁰ Local law also determines whether the mediator may state the reasons

25. *Id.*

26. CAL. CIV. PROC. CODE § 1745 (West 1982).

27. CAL. CIV. CODE § 4607(c) (West 1983 & Supp. 1985).

28. CAL. EVID. CODE § 1040 (West 1966).

29. CAL. CIV. CODE § 4607(e) (West 1983 & Supp. 1985).

30. AMERICAN BAR ASSOCIATION, *supra* note 21, at 18.

for the recommendation in the report to the court.³¹ This has permitted a wide discrepancy in the way each county handles these mediation proceedings.³² If the parties have not reached an agreement after mediation, subsection (e) provides that the mediator may recommend to the court that an investigation be conducted or that other action be taken to assist the parties in resolving the controversy prior to any hearing.

According to the statute, the mediator is required to exclude counsel from participating in the mediation sessions when the mediator thinks exclusion is appropriate or necessary.³³ The mediator is also required to assess the needs and interests of any child involved and to interview the child when appropriate.³⁴ The mediator can recommend that a restraining order be issued to protect the well-being of any child involved, pending the determination of the controversy.³⁵

The sister statute to California Civil Code section 4607 is California Civil Code section 4351.5, which was enacted in 1983 (and amended in 1983 to allow for grandparents' visitation rights). Section 4351.5 allows the courts "to award reasonable visitation rights to a person who is a party to the marriage . . . with respect to a minor child of the other party to the marriage [a stepparent]"³⁶ and "to a person who is a grandparent of a minor child of a party to the marriage,"³⁷ if visitation by the stepparent or grandparent is determined to be in the best interests of the minor child. As long as the stepparent or grandparent petitions or applies for a visitation order under this statute, the court must also allow this person's visitation right to be mediated.³⁸ The statute states that its purpose is to effect a settlement of the issue of visitation rights for all the parties involved.³⁹ However, subsection 4351.5(k) creates a rebuttable presumption that the visitation of a grandparent is not in the best interests of a minor child if the parties to the marriage agree that the grandparent should not be awarded visitation rights. There is no comparable presumption in the statute for stepparents.

31. CAL. CIV. CODE § 4607(e) (West 1983 & Supp. 1985).

32. McIsaac, *supra* note 1, at 50.

33. *Id.* § 4607(d).

34. *Id.*

35. *Id.* § 4607(e).

36. *Id.* § 4351.5(b).

37. *Id.*

38. *Id.* § 4351.5(c).

39. *Id.*

Under section 4351.5(g), a natural or adoptive parent who is not also a party to the proceeding may participate in the mediation sessions. In fact, the parent's failure to participate in mediation acts as a waiver of that parent's right to object to any settlement reached by the other parties during mediation or to require a hearing on the matter. The mediator may determine those sessions in which the nonparty parent or grandparent will participate. However, the statute does give them the absolute right to have their visitation interests mediated.

The other subsections of section 4351.5 contain the same basic provisions as section 4607 concerning the mediator's qualifications and powers, confidentiality, exclusion of counsel, and the mediator's duty to assess the needs of any children involved.⁴⁰

During the mediation sessions mandated by section 4607 and section 4351.5, the mediator attempts to steer the parties toward an agreement. If the mediator realizes that no settlement can be accomplished through mediation, the mediator terminates the sessions and informs the court in writing of the outcome. The court then sets a hearing date for the matter. At this hearing, each natural parent, adoptive parent, and grandparent seeking visitation is given an opportunity to be heard.⁴¹

California Civil Code section 4607 and section 4351.5 make mediation mandatory only for child custody or visitation disputes. Mediation is not required in California for an unsettled property division dispute at divorce. Instead, California Civil Code section 4800.9 requires arbitration when there is an unsettled property dispute and the value of the community property does not exceed \$25,000. The county family court is permitted to submit the matter to arbitration "at any time it believes the parties are unable to agree upon a division of property."⁴²

B. History of the Enactment

The drive to enact California Civil Code section 4607 and section 4351.5 began only after individual county courts had already made the mediation of child custody and visitation disputes mandatory. In the late 1970s, San Francisco, Sacramento, and Los Angeles counties were among the first California counties to make the mediation of child custody and visitation disputes man-

40. *Id.* § 4351.5(d), (e), (i).

41. *Id.* § 4351.5(h).

42. CAL. CIV. CODE § 4800.9 (West Supp. 1985).

datory.⁴³ This change occurred because many California courts were referring families to counseling or a conciliation process because the families were using the courts as a means of revenge. Judge Jack Ryburn, who was the supervising judge of the Los Angeles County Superior Court Family Law Department in 1973, suspected that families who came back to court several times were not attempting to solve legal problems, but were more concerned about unresolved emotional issues and were inappropriately trying to resolve these issues through the court system.⁴⁴

In 1978 the California legislature appointed the Family Advisory Committee to make recommendations for divorce legislation and to study the effects of the no-fault divorce law.⁴⁵ The committee recommended that reconciliation counseling be required for all families going through a divorce. This recommendation was made to pacify those opposed to the no-fault divorce statute.⁴⁶ However, even the conciliation courts objected to the recommendation because they believed a very low percentage of couples had reconciled in jurisdictions that required reconciliation counseling.⁴⁷

After a thorough study, the California Chapter of the Association of Family and Conciliation Courts recommended that the mandatory mediation of contested custody and visitation matters be extended to every California county, since the process had proved effective in those counties where mediation was mandatory.⁴⁸ The California Senate Subcommittee on Administration of Justice made a thorough study of the existing conciliation courts which became the basis for Senate Bill 961 and the present mandatory mediation statutes.⁴⁹

Senate Bill 961 received support from a wide range of groups such as the PTA, the League of Women Voters, Parents Without Partners, United Way, fathers' rights groups, and family service agencies.⁵⁰ Major opposition to the bill came from Legal Aid because of the proposed funding of the mediation program.⁵¹ A

43. McIsaac, *Mandatory Conciliation Custody/Visitation Matters: California's Bold Stroke*, 19 CONCIATION CTS. REV. 73 (1981).

44. McIsaac, *supra* note 1.

45. McIsaac, *supra* note 43, at 74.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 75.

51. *Id.* at 74-75.

\$15.00 increase in the divorce filing fee and the fee for any motion to modify or enforce a custody or visitation order, and a \$5.00 increase in the fee for a marriage license were to be used by the county family courts to fund the mediation process.⁵² Legal Aid believed that raising the filing fee for a motion, divorce, and marriage would make each action more difficult for the poor to obtain. However, Legal Aid was successful in passing its own legislation which liberalized in forma pauperis and the roadblock was removed. Senate Bill 961 and the proposed form of funding for the mandatory mediations passed the California legislature and became effective January 1, 1981.⁵³

C. The Various County Models

Originally, Senate Bill 961 separated the evaluation of child custody and visitation rights from the mediation function. The bill did not permit the mediator to make a custody or visitation recommendation to the court when the mediation session did not end in an agreement.⁵⁴ This provision was changed to read in section 4607(e), "The mediator may, consistent with local rules, render a recommendation to the court." The provision was changed because of the objections of those California counties that already combined the evaluation and conciliation functions. The compromise was made to obtain the support of all the California counties.⁵⁵

Due to this provision in section 4607(e), and the provision in section 4607(b) that allows the mediator to be a staff member of the county family conciliation court, probation department, mental health services agency, or any other person or agency designated by the court, the various California counties have developed different procedures for the mediation sessions. According to Hugh McIsaac, the Director of the Los Angeles County Conciliation Court, three approaches have emerged.⁵⁶

The first approach is the conciliation model, which keeps the mediation process fairly separate from the adversary system.⁵⁷ Los Angeles and Santa Clara counties use this approach.⁵⁸ This system has grown around the family counseling services attach-

52. *Id.* at 74.

53. CAL. CIV. CODE § 4607 (West 1983 & Supp. 1985).

54. McIsaac, *supra* note 1, at 50.

55. CAL. CIV. CODE § 4607(e) (West 1983 & Supp. 1985).

56. McIsaac, *supra* note 1, at 50.

57. *Id.*

58. McIsaac, *supra* note 43.

ed to the courts. The purpose of these counseling services is to help families reconcile rather than continue through the divorce process. This approach separates the mediation function from evaluation and recommendation functions. Under this approach the mediator does not recommend to the court how a particular family's child custody and visitation should be divided when the parties cannot reach an agreement during mediation.

The second approach some California counties use is the family court services model developed from court services which have traditionally served an evaluating function.⁵⁹ San Francisco and San Mateo counties have used this model.⁶⁰ In this model, mediation and evaluation are combined, and the mediator makes a recommendation for child custody and visitation if the parties cannot come to agreement during the mediation sessions. The basic difference between the conciliation and the family court services models is the consideration given to confidentiality and the making of a recommendation to the court when the mediation is not successful.

The third approach, generally used by the smaller counties that do not have a large family court staff, is to make contracts with private individuals and agencies to provide the mediation service.⁶¹ The original idea was that these smaller counties, in proximity to each other, would contract for a circuit rider mediator attached to the family courts. This concept did not materialize. Most of the smaller California counties either provide mediation services through their probation department or through individual contracts with private professionals.⁶² The procedure of each county determines whether the mediator will make a recommendation to the court if no agreement is reached.

Within these three basic models each county has also had room to develop its own step-by-step procedures. The mandatory mediation statutes defined the mediation process broadly so local courts could adapt their system to local conditions. One example of this is the development of the "marathon bargaining model" used by the Los Angeles County Central Court and some of the Los Angeles County district courts.⁶³ This marathon bargaining model begins by conducting an initial mediation over a four to five hour period.

59. McIsaac, *supra* note 1, at 50.

60. McLaughlin v. Superior Court, 140 Cal. App. 3d 473, 189 Cal. Rptr. 479 n.7 (1983).

61. McIsaac, *supra* note 1, at 56.

62. *Id.*

63. *Id.*

The model provides for five interviews in this time period. In the first step, the parties' attorneys are usually interviewed by the mediator, although some mediators interview all the parties and the attorneys together. The Los Angeles County Central Court has also shown an orientation film during this initial interview. The film describes the effects of divorce on children and gives pointers to parents on how to make the divorce as smooth as possible for the children. The mediator then meets with both parents together. The mediator may meet with each parent individually if necessary or if a parent requests it. There is no limit to the number of mediation sessions in which a divorcing couple may participate. The couple works together until they reach an agreement or an impasse.

The children may also be interviewed during the marathon bargaining sessions if the mediator feels interviewing them is necessary to reach a resolution (as discussed in California Civil Code section 4607(d)). According to Hugh McIsaac, the purpose of the interview with the children is to determine the effect of the divorce on the children and to use this information to help the parents reach an agreement which meets the best interests of the children.⁶⁴ According to California Civil Code section 4351.5, stepparents, grandparents, or anyone else who has a significant role in the life of the child may also be interviewed by the mediator and involved in the mediation process.⁶⁵

At this point in the Los Angeles marathon bargaining model, the mediator drafts the initial points of agreement. Points of disagreement are then resolved by trade-offs. If long-term therapy or help is required to implement the agreement, a clause may be added requiring one or both of the parties to meet regularly with a staff member of a community family agency.⁶⁶ If a final agreement is reached concerning all the points in dispute, the agreement is sent to the judge to be made an enforceable court order. Copies of the court order are mailed to the attorneys, and they have ten days to register any objections.⁶⁷

In the future, if the parties wish to modify the agreement, the parties may come directly to the Los Angeles Conciliation Court and meet with the mediator who helped make the final agreement.⁶⁸ Further mediation sessions may be held at this time to

64. *Id.* at 51.

65. CAL. CIV. CODE § 4351.5(c) (West 1983 & Supp. 1985).

66. McIsaac, *supra* note 1, at 51.

67. *Id.*

68. *Id.*

modify the agreement to coincide with the parties' or the children's changed needs.

D. *The Success Rate*

California Civil Code section 4607 (a) states that the purpose of the mandatory mediation sessions is "to reduce acrimony which may exist between the parties and to develop an agreement assuring the child's or children's close and continual contact with both parents after the marriage is dissolved."⁶⁹ Although there has been no state-wide evaluation of the mandatory mediation process to determine whether the process has achieved this purpose, the San Francisco Superior Court and the Los Angeles County Conciliation Court have studied the effects of the mandatory mediation of child custody and visitation disputes in their jurisdictions through their own surveys or evaluations.

The San Francisco Superior Court, which began mandatory mediation in 1977, evaluated the effects of mandatory mediation of child custody and visitation disputes.⁷⁰ Before the mandatory mediation requirement, the San Francisco Superior Court processed five to fifteen cases that required adversary hearings to resolve temporary custody and visitation disputes or to rule on motions for modification or enforcement of custody or visitation orders. The domestic relations judge also spent at least two afternoons a week presiding over full scale custody and visitation hearings. In 1980, three years after mediation had begun, the court had only five contested custody or visitation hearings according to Donald King, Domestic Relations Judge of the San Francisco Superior Court.⁷¹ Judge King states that, "[I]n one year there were fewer hearings than there had been in a single day under the old system."⁷² From January to November 1981, there were only three hearings involving a dispute over child custody or visitation. The court's evaluation showed that from 1977 to 1980 mediation assisted in reducing the average number of full custody or visitation hearings from two hundred and seventy-five a year to three a year.⁷³ According to the San Francisco Superior Court evaluation, from the time the mediation system was adopted in the San Francisco Superior Court in February of 1977, until November of

69. CAL. CIV. CODE § 4607(a) (West 1983 & Supp. 1985).

70. King, *supra* note 5, at 41.

71. *Id.*

72. *Id.*

73. AMERICAN BAR ASSOCIATION, *supra* note 21, at 17.

1981, "virtually no case filed within that time that used the mandatory mediation process to resolve a custody or visitation dispute has come back to court on a motion seeking modification or enforcement on these issues."⁷⁴

In 1982, the Los Angeles County Conciliation Court conducted a survey of all custody dispositions in the county's central district, which handles approximately forty percent of all custody decisions in that county.⁷⁵ The Los Angeles Court study involved 901 surveys over a three-month period. The surveys were sent to divorcing families with children, and the person picking up the final divorce decree was required to file the completed survey. The survey showed that the largest number of agreements were reached by the parents themselves, without a mediator or a judge. This group represented sixty-two percent. Twenty-seven percent of those surveyed reached an agreement through consultation with their attorneys. Agreements reached through mediation at the conciliation court represented a little over five percent of the total. Arrangements arrived at by a judicial officer also represented five percent of the total sample.⁷⁶

Several conclusions can be made from the court's study of mandatory custody mediation in the Los Angeles County central district. First, most of the parents in the survey reached a decision on their own or through an attorney, rather than through the mediation or court process. Second, the mediation process is keeping one-half of the remaining disputes out of court. This represents a cost savings, because the mediation process is much less expensive than a hearing or trial. Finally, it is apparent that even with the mandatory mediation process, primary custody is still being granted to the mother, which has been the traditional form of custody. Thus, mandatory custody mediation achieves a similar result but at a fraction of the cost and time and in a less hostile setting.

The Los Angeles County Conciliation Court study did not include a later evaluation, made after the parties had been divorced for several years, to determine if the original agreement had been successful or if the parties had to modify the agreement later. For

74. King, *supra* note 5, at 41.

75. McIsaac, *supra* note 1, at 57.

76. In 48% of the surveys, sole custody was granted to the mother. In 37%, joint custody was chosen with the mother having primary physical custody. In only one out of the 901 cases was joint custody chosen when the father had primary physical custody. In 6.5% of the cases the father received sole custody.

this reason, it may be difficult to assess whether the "acrimony" between the parties was actually reduced by mediation. Because at least half of the cases where the parties could not reach an agreement on their own or through their attorneys were settled through mediation, it would seem that the mediation sessions reduced the acrimony between the parties to the extent that agreement was possible.⁷⁷

According to the San Francisco study, mandatory mediation in the San Francisco Superior Court appears to be more successful than in the Los Angeles County central district. This is a result of the San Francisco Superior Court's outstanding reduction in the hearing case load. Unlike the Los Angeles Conciliation Court study, the San Francisco Superior Court's evaluation did not include surveys to determine what percentage of the disputes were settled before mediation began. Also, the San Francisco Superior Court mediators make a recommendation to the court as to child custody and visitation when the parties cannot reach an agreement during mediation, whereas the Los Angeles County mediators are not permitted to make a recommendation. The fear of a possible unsatisfactory recommendation may be a strong incentive for the parties to settle. This may be a reason why the San Francisco Superior Court has achieved the statutes' goal of reducing the acrimony between the parties, as evidenced by the fact that no party has returned to court to modify the mediated agreement.

Although both of these courts' statistics are helpful, a state survey of all counties needs to be performed in order to evaluate accurately California's mandatory mediation program. Los Angeles and San Francisco counties are both highly populated, urban and suburban areas. Different statistics might be generated from some of the smaller, more rural counties with different types and classes of people. Some types and classes of people are more amenable to mediation or benefit more from mediation than others. However, California Assembly Bill AB2445, enacted in September 1984, sanctions a uniform statistical reporting system for custody and visitation cases in California.⁷⁸ This reporting system will enable the gathering of mandatory mediation statistics for all the California counties. The reporting system should provide a more reliable evaluation of the new California mediation statutes.

77. See Appendix A; McIsaac, *supra* note 1, at 57.

78. Cal. Assembly Bill AB2445 (Sept. 5, 1984) (sponsored by Representative Samuel Farr and requested by the California Chapter of the Association of Family and Conciliation Courts).

III. THE ADVANTAGES OF THE CALIFORNIA MANDATORY MEDIATION STATUTES

In addition to the San Francisco Superior Court's finding that there was a low modification rate for custody and visitation disputes resolved through the mediation process, there are many other advantages to the California mandatory mediation statutes. First, there is a time savings in mediating these disputes instead of adjudicating them. This also results in a cost savings. A typical custody or visitation trial takes two days in Los Angeles County, according to the Los Angeles County Conciliation Court. This traditional custody or visitation trial cost county taxpayers \$1,526.96 (\$763.98 each day for two days) in 1979.⁷⁹ According to the conciliation court, the majority of the parties in 1979 resolved their dispute in mediation sessions in three hours, which cost the county \$67.68 (\$22.56 each hour for 3 hours) (this does not include the time spent in interviewing the parties' lawyers).⁸⁰ In 1979, Los Angeles County Conciliation Court figures indicate that the county saved \$280,362.15 through the mandatory mediation of child custody and visitation disputes.⁸¹

The most recent cost savings figures for mandatory custody and visitation mediation in Los Angeles Court were compiled in 1982. The estimated cost savings for that year was approximately \$990,000.⁸²

In addition to the county's cost savings, the family's cost for the divorce is also reduced by mediating the custody or visitation disagreement. Mediation reduces expenses for private investigators, court costs, and the attorneys needed for a courtroom trial. There may also be a need in the adversary custody and visitation process to pay expensive expert witnesses for the psychiatric examination of family members and for testifying in court.⁸³

A second advantage of mediation is that it allows for private ordering. The parties themselves resolve the problem in a way which is mutually agreeable.⁸⁴ Therefore, the family's own standards, rather than the judge's, are used to make the decision. When the families in the San Francisco Superior Court used their own standards to develop a custody and visitation settlement, there was

79. McIsaac, *supra* note 42, at 77.

80. *Id.*

81. See Appendix B; McIsaac, *supra* note 43, at 77.

82. McIsaac, *supra* note 1, at 53.

83. Note, *supra* note 2, at 585.

84. McIsaac, *supra* note 1, at 52.

no need for modification or enforcement orders later.⁸⁵

The judicial award of custody has become more controversial in recent years. Most states have recently replaced maternal preference standards with discretionary sex neutral standards that stress the best interests of the child.⁸⁶ According to a recent Colorado study, these new standards do not mean that custody decisions have changed.⁸⁷ The study analyzed 120 contested custody cases adjudicated in Colorado prior and subsequent to the legislature's adoption of a sex neutral, best interest standard. The study revealed that custody awards continued to favor mothers substantially.⁸⁸

One problem with the judicial determination of custody and visitation is the criteria to be used in ascertaining the best interests of the child. A recent review states that the literature discussing the best interest standard now includes more than fifty articles on custody decision making. This literature contains approximately 299 standards to be applied.⁸⁹ Dr. Jessica Pearson, the Director of the Denver, Colorado Custody Mediation Project, states: "Judges complain that they are asked to make predictions and measurements of character that are not susceptible to balance sheet resolutions or accurate methodologies. On the other hand, many people feel that judges act on their own biases and values in deciding the best interest of the child."⁹⁰ Judges and lawyers are also poorly trained to deal with the psychological aspects of divorce. Pearson states that because "lawyers replace rather than assist couples with negotiations, the agreements generated inspire little commitment and fail to enhance the conflict management skills of the parties."⁹¹ Mediation eliminates these problems by promoting family self-determination. Mediation also demonstrates the kind of behavior required to make the agreement work and forms the negotiation skills necessary to resolve future conflicts without the help of a mediator or a counselor.⁹²

Mandatory mediation is also advantageous in the resolution of custody disputes because it is an alternative to the emotionally harmful adversary method. Many writers argue that the adversary

85. See *supra* text accompanying notes 72-76.

86. Pearson, *supra* note 9, at 5.

87. *Id.*

88. *Id.*

89. Pearson, *supra* note 9, at 12 n.8.

90. Pearson, *supra* note 9, at 6.

91. *Id.*

92. Spencer & Zammit, *supra* note 3.

system is inappropriate for the resolution of marital disputes. These writers accuse the adversarial system of "increasing trauma, escalating conflict, obstructing communication, failing to provide for the negotiating and counseling needs of divorcing couples, and ignoring the underlying causes of grievances."⁹³ The emotional strain of an adversary proceeding has a great effect on both the parents and the children. This inhibits rather than aids the building of a new life, and makes it difficult for the parents to respond to their children's emotional needs during the divorce process.⁹⁴ In an adversary custody battle, children are often used by the parents as weapons.⁹⁵ The mandatory mediation of child custody and visitation removes the parental role from the adversary process.⁹⁶ During the mediation sessions, the focus is on future behavior rather than trying to attach blame to past conduct.⁹⁷ This eliminates the need to use the children as weapons.

A fourth advantage which applies specifically to the California mandatory mediation statutes is the requirement in California Civil Code section 4351.5 that any party seeking visitation, who has been a significant part of the child's life, may participate in the mediation sessions. Florence Bienenfeld, a mediator for the Los Angeles County Conciliation Court states that she serves the whole family in mediation.⁹⁸ Interested individuals also have no legal right to visitation in most adversary custody proceedings. They cannot participate unless the parents allow them into the process. The relatives, often the grandparents, may also play a large role in frustrating the court's custody and visitation decree.⁹⁹ California Civil Code section 4351.5 gives these interested individuals the rights that many of them have long been requesting and deserve.

The last major advantage of mediating custody and visitation disputes is that mediation allows each discipline to do what it does best.¹⁰⁰ The attorney serves as an advocate for his party. The

93. Pearson, *supra* note 9, at 6.

94. Elkin, Post-Divorce Counseling in a Conciliation Court (unpublished manuscript, portions of which were prepared for presentation at the Third Invitational Conference on Marriage Counselors' Education on Oct. 9, 1976 in San Francisco, California; available from the Conciliation Court, Los Angeles County, California).

95. Kelley & Wallerstein, *The Effects of Parental Divorce: Experiences of the Child in Early Latency*, 46 AM. J. ORTHOPSYCH. 20 (1976).

96. McIsaac, *supra* note 1, at 53.

97. *Id.*

98. F. BIENEFELD, CHILD CUSTODY MEDIATION 31 (1983).

99. McIsaac, *supra* note 1, at 53.

100. *Id.* at 53.

mediator is concerned with the long-term relationship of the parties. The judicial officer oversees the process and makes a decision if mediation is not successful.

IV. DISADVANTAGES OF THE CALIFORNIA MANDATORY MEDIATION STATUTES

A. *Psychological and Social Factors*

According to mediation authorities, the process is not right for everyone. The Family Division of the Connecticut Superior Court has identified four situations which are not appropriate for custody or visitation mediation. The Connecticut Superior Court believes that in these situations children are best served by a traditional court evaluation and judicial determination. The four situations identified by the Connecticut Superior Court are:

- (a) cases involving children who have been or are alleged to be physically abused or neglected;
- (b) most situations that involve multiple social agency and psychiatric contacts for the adults or children;
- (c) postjudgement cases involving long-standing, bitter conflict between the parties and a history of repeated court appearances; and
- (d) cases in which one or more of the adults has experienced serious psychological problems or has demonstrated erratic, violent, or severely antisocial modes of behavior.¹⁰¹

Dr. Jessica Pearson agrees with the Connecticut Superior Court that individuals with severe disorders clearly have counseling and therapy needs which are not met by mediation.¹⁰² The California mandatory mediation statutes have no exemption provision for these types of individuals. Hugh McIsaac does state that a California mediator can refer cases which involve a psychological problem to an evaluator.¹⁰³

There is still no provision for the situation described in point (c) by the Connecticut Superior Court—that of a long-standing conflict between the parties with a history of bitter court appearances. Pearson states that the key to a successful mediation is a cooperative and committed attitude by the parties. She also states that timing is important because the parties must go through a

101. Pearson, *supra* note 9, at 12 n.8.

102. *Id.* at 10.

103. McIsaac, *supra* note 1, at 53.

cooling-off stage before mediation will work.¹⁰⁴ When the proper attitude is lacking, such as in the case of a bitter and long-standing conflict, the success of mediation is highly questionable.

McIsaac agrees that mediation will not be successful when the parties are not negotiating in good faith or when one party is using the process to gain an advantage over the other.¹⁰⁵ One party may be using the mediation sessions as discovery. Mediation may also be used by the more dominant party to bully the weaker party into an agreement. McIsaac believes a skilled mediator can be successful in evening the power balance.¹⁰⁶

This power imbalance poses a real problem to the mediator's impartiality and to the possibility of reaching a fair agreement which will not have to be modified later by the weaker party. Feminists have objected to mandatory mediation of divorce disputes because they feel the wife is generally in the weaker bargaining position and in need of judicial protection. This is due to the husband's usual financial and social dominance and the wife's willingness to make concessions to obtain custody of the children.¹⁰⁷

Social, as well as psychological factors, may also determine the success of mediation. Pearson found in her mediation studies in Colorado that people who choose mediation, compared to those required to use it, as in California, generally are "better educated, have more money, and are motivated by their experiences with or expectation of the courts."¹⁰⁸ According to Pearson, the personal approach is more appealing to them. Pearson states, however, that these individuals are less likely to reach an agreement during mediation than are other types of people. In Pearson's study, while thirty-six percent of the individuals with a college or a graduate education reached an agreement, forty-three percent of those with a grade school or a high school education were successful in reaching an agreement. Similarly, while thirty-four percent of professionals and managers resolved their custody or visitation dispute through mediation, fifty-four percent of machine operators and laborers resolved their dispute by mediation.¹⁰⁹ These percentages indicate that those people who are the least likely to mediate,

104. Pearson, *supra* note 9, at 10.

105. McIsaac, *supra* note 1, at 53.

106. *Id.*

107. See Rifkin, *Mediation From a Feminist Prospective: Promise and Problems*, 2 LAW & INEQUALITY 51 (1984).

108. Jenkins, *supra* note 4, at 33.

109. *Id.*

unless forced, are also the most likely to resolve their dispute through mediation. These percentages also show that some types of parties may benefit more from mediation than others.

The new mobility of our society may also be a problem in the mediation of custody and visitation disputes. An out-of-state parent may find it extremely difficult to travel to California and attend several mediation sessions over a period of time. In comparison, a hearing or a trial is usually conducted in one or two consecutive days and an out-of-state party may choose not to attend but to be represented by an attorney.

Because of the social and psychological differences involved in each child custody and visitation dispute, the California mandatory mediation statutes should contain an exclusion mechanism by which the cases that should never be mediated or that show no hope of reconciliation would be eliminated. The general thrust of the statutes should still be toward mandatory mediation, but time and money would be saved and the best interests of the child would be better served through such an exclusion.

B. *The Child's Rights*

Another major problem with the California mandatory mediation statutes is that the child involved in the divorce has minimal rights. The California mandatory mediation statutes do require that the mediator "assess the needs and interest of the child or children involved in the controversy, and that the mediator shall be entitled to interview the child or children when the mediator deems such an interview appropriate or necessary."¹¹⁰ The mediator may also recommend the issuance of a restraining order against a parent or another person involved to protect the child.¹¹¹ The statute does not state that the mediator is to consider the best interests of the child. This omission may be necessary to maintain mediator impartiality.¹¹² Robert Coulson, a mediation expert and an author of many arbitration and mediation books, argues that a mediator in family disputes should represent no one and should not take sides. He states that, "at most, a mediator is expected to interpret the children's interests realistically to the parents."¹¹³

Many states are now requiring courts to appoint a lawyer for

110. CAL. CIV. CODE § 4607(d) (West 1983 & Supp. 1985).

111. *Id.* § 4607(e).

112. F. BIENENFELD, *supra* note 98, at 45.

113. R. COULSON, *FIGHTING FAIR* 107 (1983).

the child involved in a custody or visitation battle.¹¹⁴ Because there is no judge or other official participating in the mediation sessions who is considering the best interests of the child, California needs to add a provision to the mediation statutes requiring that the court appoint a lawyer for the child. This would ensure that the child's interests are not completely neglected.

The need for representation by a lawyer also exists in non-mediated settlements made before the parties reach the court system. In these cases, a lawyer should be appointed to represent the child's interests to the judge who will be affirming or denying the incorporation of the settlement into the divorce decree. In both cases one disadvantage is that appointing a lawyer for the child means an increase in the cost of a custody or visitation decision.

C. Confidentiality and Due Process

The most significant flaw in the California mandatory mediation statutes is the local rule allowance of partial confidentiality of the mediation sessions. Because of the allowance of only limited confidentiality in some counties, two problem areas have arisen: (1) the right to cross-examine the mediator when no agreement is reached and the case goes to hearing or trial; and (2) the proper relationship between the court and the mediator.

In 1983 the California appeals court decided *McLaughlin v. Superior Court for San Mateo County*,¹¹⁵ a case involving the right to cross-examine a mediator. In *McLaughlin*, the plaintiff originally requested a writ of prohibition restraining the San Mateo County Court from enforcing its order requiring the couple to submit their temporary custody dispute to mediation. The plaintiff did not want to mediate the dispute unless he could have a protective order prohibiting the mediator from making a recommendation to the court if no agreement was reached or unless he was permitted to cross-examine the mediator if the case went to trial. San Mateo County employed the family court services model previously discussed in which both the conciliation and evaluation function are the responsibility of the mediator. According to San Mateo County rules, the mediator was required to submit a custody or

114. States which have statutes requiring that an attorney be appointed for the child involved in a divorce, either in all situations or only when a problem exists, include: Alaska, ALASKA STAT. § 25.24.060 (1984); Delaware, DEL. CODE ANN. tit. 13 § 721 (1981); Iowa, IOWA CODE ANN. § 598.12 (West 1981 & Supp. 1985); Montana, MONT. CODE ANN. §§ 40-4-212, 40-4-214 (1983); and Utah, UTAH CODE ANN. § 30-3-11.2 (1984).

115. 140 Cal. App. 3d 473, 189 Cal. Rptr. 479 (1983).

visitation recommendation to the judge when no agreement was reached during mediation.

In *McLaughlin*, the California appeals court held that those counties which required a mediator recommendation but disallowed mediator cross-examination at trial were violating due process. The court interpreted the California mandatory mediation statute as being consistent with the Constitution. The court ruled that counties may require a mediator recommendation only if they issue a protective order to the parties that will guarantee either party the right to cross-examine the mediator or if all parties waive the right to cross-examine the mediator.

In *Ohmer v. Superior Court of California, County of Los Angeles*,¹¹⁶ a California appeals court commented in dicta that the rule in *McLaughlin* may apply only to the mandatory use of court personnel. In *Ohmer*, the plaintiff voluntarily requested the assistance of a court-appointed custody investigator and psychiatrist and signed a form waiving the right to cross-examine them. Although the court decided the waiver was the real reason the plaintiff could not cross-examine the court-appointed professionals,¹¹⁷ it implied that the *McLaughlin* rule may not apply when the party voluntarily chooses to employ the court-appointed professional's services.¹¹⁸

The other problem arising from a rule that requires the mediator to make a recommendation to the court is defining the proper relationship between the mediator and the court. In the case of *In re Marriage of Russo*,¹¹⁹ a California appeals court held it was error for the trial court to consider the results of an investigation in a conference by the court with the domestic relations commissioner that was outside the proper evidentiary procedures.

In the later case of *In re Marriage of Wood*,¹²⁰ the plaintiff attempted to apply the rule of *In re Marriage of Russo*, when the trial court failed to indicate on the record the results of the parties' mediation sessions. The California appeals court in *Wood* held that the California Civil Code Section 4607 does not require the court to indicate the failure of mediation. The court added that if the mediator does make a report to the court, the parties should be notified of that fact.

116. 148 Cal. App. 3d 661, 196 Cal. Rptr. 224 (1983).

117. *Id.* at 669, 196 Cal. Rptr. at 228.

118. *Id.* at 669-70, 196 Cal. Rptr. at 229.

119. 21 Cal. App. 3d 72, 98 Cal. Rptr. 501 (1971).

120. 141 Cal. App. 3d 671, 190 Cal. Rptr. 671 (1983).

It is evident that the local rule provision which allows the mediator to make a recommendation to the court has created numerous problems. One mediation authority is concerned that the provision turns mediators into "deputy judges" and robs the mediation process of the very confidentiality and trust that have made it so effective.¹²¹ Originally, the statute was written with a provision that eliminated the mediator's recommendation. As discussed previously, several counties would not accept the statute without the local rule provision because their conciliation counselors were already making recommendations to the court. Their current system of operation would have been upset without the local rule provision, and they would have had to employ extra personnel. The cases demonstrate that the statute should have maintained its original form to eliminate the present due process and confidentiality problems and confusion. There may be an argument that a mediator recommendation further assures the best interest of the child. This is better resolved by appointing a lawyer for the child.

V. WHAT CALIFORNIA CAN LEARN FROM OTHER STATES

Although California was the first state to enact a mandatory mediation statute, other states have also used mediation to settle child custody and visitation disputes. Recent estimates show that approximately eighteen states are using mediation to resolve these disputes.¹²² Alaska, Delaware, Iowa, Maine, Michigan and Oregon,¹²³ as well as California, have statutes or court rules which provide for the mediation of divorce disputes. It is difficult to estimate how many other states allow mediation of child custody and visitation disputes because this has been accomplished in some states through a general provision giving judges the power to provide counseling or alternate means of decision making for the parties.¹²⁴

Delaware became the second state to require mediation of custody and visitation disputes on May 1, 1981 by enacting Delaware Family Court Rule 470.¹²⁵ Delaware is also the first

121. Jenkins, *supra* note 4, at 45.

122. *Id.*

123. ALASKA STAT. § 25.24.060 (1984); DEL. FAM. CT. R. 470, 151 and 465; IOWA CODE § (1983) (for joint custody disputes only); MAINE PUBLIC LAW 1983, Chapter 813 (July, 1984); MICH. COMP. LAWS ANN. § 552.513 (West 1984); OR. REV. STAT. §§ 107.755-107.795 (1984).

124. Wisconsin, for example, allows judges to prescribe mediations through the general adjudicative power given to them in WIS. STAT. ANN. § 767.01 (West 1981).

125. DEL. FAM. CT. R. 470, May 1, 1981.

state to require the mediation of child and spousal support (Delaware Family Court Rule 151),¹²⁶ and the mediation of property division, alimony, attorney's fees and court costs for divorce (Delaware Family Court Rule 456).¹²⁷

It appears that Delaware did not use the California mandatory mediation statutes as a model for its mandatory custody and visitation mediation rule. Unlike the California mandatory statutes, the Delaware rule does not include mediator qualifications or the rights of interested third parties (e.g., grandparents' rights). The parties to a custody or visitation mediation in Delaware may apply to the court before or after the mediation sessions have commenced to have their case referred to a judicial proceeding.¹²⁸ Attorneys for the parties to a custody or visitation mediation may attend and participate in the mediation sessions at their own election. In California the mediator has a right to exclude the attorney from these sessions.¹²⁹

After six years of experience with a court-sponsored voluntary mediation service for domestic relations cases, Maine has followed Delaware in becoming the third state to require mediation of child custody disputes.¹³⁰ Effective in July 1984, Maine enacted Public Law 1983, Chapter 813, which requires Maine courts to refer all separation, annulment, or divorce actions to mediation prior to a contested hearing or trial if minor children are involved. Like the California statutes, Maine submits every mediated child custody agreement to the court for its approval.¹³¹ Unlike California, Maine courts must determine whether the parties made a good faith effort to mediate when no agreement is reached through mediation. If the court determines that the parties' effort was not in good faith, it may send the parties back to mediation before proceeding to a contested hearing or trial.¹³² This assures that most issues concerning the parents and children are first addressed in a nonadversarial forum.¹³³

Oregon's mediation statutes give each county the right to decide

126. DEL. FAM. CT. R. 151.

127. DEL. FAM. CT. R. 465.

128. See *supra* note 131.

129. *Id.*

130. SEE AMERICAN BAR ASSOCIATION, LEGISLATION ON DISPUTE RESOLUTION UPDATE SERVICE, ISSUE NO. 1 (Jan. 1985) and Maine Pub. L. No. 1983, ch. 813 (July, 1984).

131. AMERICAN BAR ASSOCIATION, *supra* note 130, at 4.

132. *Id.*

133. *Id.*

whether custody and visitation mediation will be mandatory.¹³⁴ The statutes allow the circuit court in each judicial district, by an affirmative vote of a majority of the judges, to provide mediation for child custody and visitation disputes.¹³⁵ If a circuit court votes to make mediation available, the court must refer every custody and visitation dispute to mediation.¹³⁶

Florida has also passed a bill that gives each county the option of establishing a family mediation program.¹³⁷ Oklahoma has recently passed an act that will allow counties to establish mediation programs for any type of case that the counties deem appropriate for mediation.¹³⁸ This method of allowing each county to decide whether to establish a mediation program, if used in California, might have eliminated the opposition to the California statutes raised by several counties. Each county would have had the opportunity to make its own decision on the issue.

Oregon's system does not eliminate those cases that should not be mediated because of psychological or social factors. Alaska, Michigan, and Iowa have decided to make mediation available on a voluntary or referral basis. The Alaska mediation statute¹³⁹ allows a party in any type of divorce action to file a motion with the court requesting mediation. The opposing party may answer the motion, and the judge issues a final order to allow or disallow the mediation. The court may also order mediation without a request from a party if it determines that mediation may result in a more satisfactory settlement. After the first conference, either party may withdraw or the mediator may terminate the process if it is determined that further efforts will be unsuccessful.

The Alaska statute also requires that counsel, including a court-appointed counsel for the child, attend the mediation sessions. Michigan has no referral provision in its mediation statute.¹⁴⁰ The statute does require each court to provide mediation services if requested. Michigan's mediation services are to be provided through existing staff or through a court-appointed private mediator. Iowa's mediation statute¹⁴¹ allows the court to refer the parents to mediation when one parent requests joint custody and

134. *OR. REV. STAT.* § 107.755 (1984).

135. *Id.*

136. *OR. REV. STAT.* § 107.765 (1984).

137. *FLA. STAT. ANN.* § 749.01 (West Supp. 1985).

138. *OKLA. STAT. ANN.* tit. 12, § 1803 (West Supp. 1984-85).

139. *ALASKA STAT.* § 25.25.060 (1984).

140. *MICH. COMP. LAWS ANN.* § 552.513 (West 1984).

141. *IOWA CODE* § 598.41 (West Supp. 1985).

the other parent does not agree. These three states' statutes contain exclusion provisions, either allowing the court to weed out those cases not proper for mediation or extending mediation only to interested parties. Because some cases are psychologically and socially improper cases for mediation, California should also amend its statutes to allow for such exclusionary provisions.

The Michigan and Oregon statutes and the Delaware court rule also contain better confidentiality provisions than the California mediation statutes. The mediator in Oregon does not make a recommendation to the court.¹⁴² The Oregon mediation statutes also provide: "A party or any other individual engaged in mediation proceedings shall not be examined in any civil or criminal action as to such communications and such communications shall not be used in any civil or criminal action without the consent of the parties to the mediation."¹⁴³ This statute states that no exceptions to this testimonial privilege apply and that court records with respect to the mediation shall be closed. Michigan provides for confidentiality in its statutes:

[A] communication between a domestic relations mediator and a party to a domestic relations mediation is confidential. The secrecy of the communication shall be preserved inviolate as a privileged communication. The communication shall not be admitted in evidence in any proceeding. The same protection shall be given to communications between the parties in the presence of the mediator.¹⁴⁴

Delaware Family Court Rule 470, which provides for the mandatory mediation of custody and visitation disputes, states that "nothing said by the parties or other persons participating during the conference(s) may be used against them in subsequent proceedings in this court."¹⁴⁵ There may be exceptions to these provisions under the duty to report child abuse.¹⁴⁶ Confidential mediation sessions allow disputants to participate fully and freely without fear that their statements might later be used in court.

The Oregon and Michigan mediation statutes and the Delaware court rule are more explicit than the California mediation statutes in regard to the confidential nature of the mediation sessions. The California mediation statutes refer the reader to a California

142. OR. REV. STAT. § 107.765(2) (1984).

143. *Id.* § 107.775(2) (1984).

144. MICH. COMP. LAWS ANN. § 552.513(3) (West Supp. 1985).

145. See *supra* note 131.

146. MICH. COMP. LAWS ANN. § 722.623 (West Supp. 1985), for example, requires that social workers (a mediator may be determined to be a social worker) report child abuse.

Evidence Code section which states a general statutory privilege to be applied in many situations. This has caused confusion. The California mediation statutes should contain language similar to that found in the Michigan and Oregon statutes. This language states that all communications during the mediation sessions will not be admitted in any proceedings, civil or criminal. The California statutes should also eliminate the local rule doctrine and disallow mediator recommendations to the court, as Oregon and Michigan have done.

VI. MEDIATION AND THE BAR

The bar has an active role in the mediation sessions under the California mandatory mediation statutes. Mediators often call upon the attorneys to assist in removing roadblocks. Roadblocks which arise include instances when parents take unreasonable positions on one or more issues. The mediator may confer with one party's attorney or both parties' attorneys, out of the presence of their clients, to explain the situation and to seek assistance. The attorneys also help the parents keep the custody and visitation disputes separate from disputes over property and support and prepare the parties for the mediation process.¹⁴⁷

Stanley Cohen, a University of Oregon psychiatry professor, states that there are still traditionalists in the bar who do not trust mediation because they see it as an intrusion.¹⁴⁸ Cohen believes that mediation requires a close working relationship between the mediator and the attorney. In the Denver mediation program, Dr. Jessica Pearson has given the bar an active role in the mediation program's governance.¹⁴⁹

According to the qualifications required of a court-appointed mediator under the California mandatory mediation statutes, a lawyer cannot be a court-appointed mediator unless the lawyer has a master's degree in psychology, marriage counseling, social work, or a related field.¹⁵⁰ Most of the other states that have a mediation statute allow attorneys without these degrees to be court-appointed mediators.

The California mandatory mediation statutes do not keep lawyers from privately mediating divorce disputes for individuals

147. King, *supra* note 5.

148. Jenkins, *supra* note 4, at 45.

149. Pearson, *supra* note 9, at 6.

150. CAL. CIV. CODE §§ 4351.5, 4607 (West 1983 & Supp. 1985). For the explicit requirements, see CAL. CIV. PROC. CODE § 1745 (West 1982).

who come to them before reaching the court system. Because of lawyers' interest in private mediation, the American Bar Association passed standards of practice for lawyer mediators of family disputes in August 1984.¹⁵¹ Some lawyers are also working with psychologists to form private mediation teams, with the psychologist resolving the parties' emotional problems and the lawyers drafting the agreement.¹⁵² This situation, however, may raise a problem with the ethical prohibition against lawyers becoming partners with nonlawyers.¹⁵³ A similar problem arises for lawyer-mediators because of the ethical prohibition against representation of parties on both sides of a controversy.¹⁵⁴ Because of lawyer interest in mediation, state legislatures or local bar associations need to adopt rules to cover these mediation situations.

VIII. CONCLUSION

Despite the technical problems with mandatory mediation, Jay Folberg, Professor of Law at Lewis and Clark Law School and former President of the Family Law Section of the Oregon Bar Association, believes most states will soon be adopting mandatory mediation statutes.¹⁵⁵ His reasons for this belief include this country's almost complete acceptance of no-fault divorce, the continually high number of divorces causing severe court case loads, the increased complexity of interfamily relationships such as cooperative parenting after divorce and grandparent rights, the court's recognition that divorce is emotional as well as legal, the constitutional trend toward family privacy, and the increased costs of trying domestic cases.¹⁵⁶ Folberg states that a tremendous amount of money could be saved if all custody cases in the United States were mediated.¹⁵⁷

151. *ABA Standards of Practice for Lawyer Mediators in Family Disputes*, [Reference File] FAM. L. REP. (BNA) Practice Aid No. 21 (Sept. 11, 1984).

152. Jenkins, *supra* note 4.

153. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-8 (1984).

154. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-8, 5-14, 5-15 (1984). For more information on the legal ethics of mediation, see: Crouch, *Divorce Mediation and Legal Ethics*, 16 FAM. L.Q. No. 3 (1982); Gaughan, *An Essay on the Ethics of Separation and Divorce Mediation*, in AMERICAN BAR ASSOCIATION, SPECIAL COMMITTEE ON DISPUTE RESOLUTION, *ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION* (1982); and Zumeta, *Mediation as an Alternative to Litigation in Divorce*, 62 MICH. ST. B.J. 434 (1983).

155. Folberg, *The Changing Family—Implications for the Law*, 19 CONCILIATION CTS. REV. 1, 4 (1981).

156. *Id.*

157. *Id.*

While state legislatures may look at the California mandatory mediation law as a model, that model first needs revision. Although it has been shown that mandatory mediation of custody and visitation disputes has advantages over the adversary fault-finding forum, California's mandatory mediation statutes contain flaws.

First, California should amend the statute to provide for the exclusion of improper cases from mediation, such as cases involving psychological problems. This could be accomplished with a court psychologist who would review all the cases and exclude those not proper for mediation. The statutes could be amended to contain a court referral provision similar to one contained in the Alaska mediation statute. Second, the California mediation statutes need to provide for a court-appointed lawyer for the child to protect the child's best interests. This is needed because mediation works best when the mediator is impartial, and there is no judge in mediation to protect the child's best interests. The child's lawyer should be allowed to participate in the mediation sessions since the child is also a party in the dispute. Third, California's allowance of local rule should be abolished. The mediator should not be allowed to make a custody or visitation recommendation to the court when no agreement is reached during the mediation sessions. This would preserve the benefits of confidential mediation. The mediator should only be allowed to report to the court whether or not the parties reached an agreement, and if an agreement was reached, give a copy of the agreement to the court to be included in the divorce decree. Finally, California should state the mediation statutory privilege directly in the mediation statutes, including the prohibition against using any mediation conversations in any civil or criminal proceeding. This would avoid the problem of later cross-examination of the mediator.

For mediation to be successful, it is essential that the individual rights of the parents, children, and other interested parties be preserved. Only when custody and visitation mediation includes the right of family self-determination, as well as the right of privacy, will the best interest of all parties be served.

APPENDIX A

Los Angeles Study Mandatory Custody Mediation

Methodology—A one-page information form was used to gather the necessary information. Once the form was collected, information was fed into the computer with the following coding:

- I. Divorce Number—The numbers themselves.
- II. Number of Children—1, 2, 3, 4, 5, or more.
- III. Ages of Children—Male Ages of Children—Female

A - Under two	A - Under two
B - Two to five	B - Two to five
C - Five to twelve	C - Five to twelve
D - Twelve to eighteen	D - Twelve to eighteen
- IV. Final Decision Regarding Arrangement

jo — Joint legal and physical custody
jm — Joint legal custody with primary physical custody to mother.
jf — Joint legal custody with primary physical custody to father.
sm — Sole custody to mother
sf — Sole custody to father
sp — Split custody (children divided among parents)
ss — Custody to social services
- V. Arrangement arrived at primarily through:

a — Agreement of the parties by themselves
b — Agreement of the parties in consultation with attorney
c — Agreement of the parties in consultation with private mental health professionals
d — Agreement of the parties in consultation with Conciliation Court
e — Decision by a judicial officer in a contested custody trial.

- VI. Recommendation Followed
y - yes n - no
1. **Results of the Survey**

The total number of Child Custody Disposition surveyed901
The total number of Child Custody Disposition Survey with no children374
The total number of survey with children527
2. The total number of children involved.....882
3. The total number of families with 1 child..... $278 \times 1 = 278$
 The total number of families with 2 children..... $175 \times 2 = 350$
 The total number of families with 3 children..... $53 \times 3 = 159$
 The total number of families with 4 children..... $15 \times 4 = 60$
 The total number of families with 5 children..... $7 \times 5 = 35$

Total	882
-------	-----
4. The total number of male children 478
 The total number of female children 404

Total	882
-------	-----
5. Total number of male children in percentages = 54.3%
 Total number of female children in percentages = 45.7%
 Total number of male children

ages 0-2	= 81	17%
2-5	= 112	23%
5-12	= 178	37.5%
12-18	= 105	22.5%
Total	476	
- Total number of female children

ages 0-2	= 41	10%
2-5	= 90	22%
5-12	= 171	43%
12-18	= 99	25%
Total	401	

As the survey indicates, ages of children involved in the Child Custody Disposition appear to be high in the 5 to 12 age group in both male and female categories.

As to the final decision regarding custody, the survey clearly indicates that sole custody to mothers appears to be the category of final decisions.

Joint legal and physical custody.....	33	6.5%
Joint legal custody with primary physical custody to mother....	194	37%
Joint legal custody with primary physical custody to father.....	1	0
Sole custody to mother	253	48%
Sole custody to father....	33	6.5%
Split custody (children divided among parents)	12	2%
Other—(DPSS Protective Custody)	1	0
Total	527	

7. The survey indicates that 62% of the arrangement regarding final decision was arrived at by the parties themselves. Agreement reached in consultation with Conciliation Court was 5.8%. Agreement of the parties in consultation with attorney was 27%. Arrangement arrived at by a judicial officer in a contested custody trial was 5%. There were only two decisions made in consultation with private mental health professionals which amounted to .2%.

Arrangement of Decision

- A — Agreement of parties by themselves.
- B — Agreement of parties in consultation with attorney.
- C — Agreement of parties in consultation with private mental health professionals.
- D — Agreement of the parties in consultation with Conciliation Court.
- E — Decision by a judicial officer in a contested custody trial.

APPENDIX A (Cont.)

Los Angeles Study (Cont.)

CUSTODY DISPOSITION SURVEY

Central District

	Agreement Parties	Attorney	Mental Hlth. Profession	Conc. Court	Contested	Total	%
JFa.	0	1	0	0	0	1	2
JMo	88	74	0	17	7	194	36
JO	16	10	2	3	1	33	6
SFa.	25	4	0	0	1	33	6
SMo.	179	47	0	5	17	253	49
Split	8	3	0	2	0	12	3
Other	1	0	0	0	0	1	2
TOTALS	317	139	2	27	26	527	
Percent (%)	62%	27%	4%	5%	5%		

JFa = Joint legal custody with primary physical custody to father.

JMo = Joint legal custody with primary physical custody to mother.

JO = Joint legal and physical custody.

SFa = Sole legal and physical custody to father.

SMo = Sole legal and physical custody to mother.

Split = One child, or more, with each parent.

APPENDIX B

Los Angeles Cost Study

COMPARATIVE COST—1979 CONCILIATION VS. TRIAL COURT CUSTODY AND VISITATION MEDIATION LOS ANGELES COUNTY

I. CUSTODY & VISITATION MEDIATION

A. Conciliation Cost

\$2385.18 p/mo. = 13.55/hr.

176 hr./mo.

\$13.55

Fringe Benefits 25.6% × 13.55 =

3.47

Overhead Cost 41.6% × 13.55 =

5.64

\$22.66 p/hr.

B. Trial Court Cost

\$3,839.53 Commissioner

2,427.00 Court Reporter

1,867.00 Court Clerk

1,919.00 Sheriff II

\$10,052.53

10,052.53 p/mo. = \$456.93 p/day

22

456.93

Fringe Benefits 25.6% × \$456.93 =

116.97

Overhead Cost 41.6% × 456.93 =

190.08

\$763.98

C. Cost Comparison

1. Trial Court

1,041 × 763.98 = \$397,651.59

2

2. Conciliation

1,733 × 3 hrs. × 22.56 = 117,289.44

Net Savings

\$280,362.15

II. PREMARITAL CONSENT EVALUATIONS

A. Conciliation

1,492 × 1 hr. × \$22.66 = \$33,808.72

B. Trial Court

\$763.98 × 1,492 = 189,976.35

6 p/day

Net Savings Premarital Consent

\$156,167.63

TOTAL SUMMARY OF SAVINGS — 1979

C&V = \$280,362.15

PMC = 156,167.63

\$436,529.78

